Gaucho Food Products, Inc. *and* the United Food and Commercial Workers International Union, AFL–CIO, Local 100-A. Cases 13–CA–31007, 13–CA–31108, and 13–CA–31185

August 13, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On April 12, 1993, Administrative Law Judge Joel A. Harmatz issued the attached decision. The General Counsel has filed limited exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions, to modify the remedy,[1] and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Gaucho Food Products, Inc., Chicago, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Add the following new paragraph 2(a) and reletter the subsequent paragraphs.

''(a) On request, rescind the unilateral changes the Respondent made in the terms and conditions of employment of unit employees.''

2. Substitute the attached notice for that of the administrative law judge.

[1] The judge inadvertently failed to include in his decision the Board's traditional remedial provisions for the Respondent's unilateral termination of contractually required wages and benefits, and health, welfare, and pension plan contributions. Accordingly, we have modified the judge's recommended remedy to require that the Respondent remit all payments it owes to fringe benefit funds, with interest, as specified in *Merryweather Optical Co.*, 240 NLRB 1213 (1979), and to make whole the employees for any expenses they may have incurred as a result of the Respondent's failure to make such payments in the manner set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). The Respondent shall also make whole its employees for any loss of wages and benefits they may have suffered by reason of the Respondent's failure to pay contractually required wages and benefits in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971). All payments to employees shall be made with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[2] The General Counsel excepts only to the judge's failure to include in his recommended Order a provision requiring the Respondent, on request, to restore the status quo which existed prior to the Respondent's unlawful unilateral changes in terms and conditions of employment. We find merit to this exception, and shall modify the judge's recommended Order accordingly.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain in good faith with the United Food and Commercial Workers International Union, AFL–CIO, Local 100-A, concerning the rates of pay, wages, hours, and working conditions of employees in the following appropriate unit:

> All production and maintenance employees, excluding nonworking supervisory foremen, office workers, salesmen, and engineers.

WE WILL NOT refuse to bargain in good faith by declining, on request, to furnish information relevant and necessary to the Union's performance of its duties as exclusive representative of these employees.

WE WILL NOT, without bargaining in good faith with the Union, fail to pay employees in the above unit their established wage rates, and their accrued holiday and vacation benefits.

WE WILL NOT, without bargaining in good faith with the Union, terminate health and welfare contributions on behalf of unit employees.

WE WILL NOT tell our employees that they should quit, rather than complain about unlawfully denied employment terms.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, rescind the unlawful unilateral changes in terms and conditions of employment for unit employees.

WE WILL, on request, furnish the Union with the information sought in its letter of August 12, 1992.

WE WILL make whole unit employees, with interest, for all underpaid wages and unpaid holiday and vacation benefits.

WE WILL reimburse the Local 100-A Health and Welfare Fund and the Local 100-A Pension Fund, with interest, for all unpaid contributions.

WE WILL reimburse unit employees, with interest, for any and all losses sustained by reason of any loss of eligibility for health and welfare benefits caused by our unlawful refusal to bargain.

GAUCHO FOOD PRODUCTS, INC.

Emilie F. Schrage, Esq., for the General Counsel.
Edwin R. Dunmore, consultant, of Chicago, Illinois, for the Respondent.
Steven Tarnowski, vice president, Local 100-A, of Chicago, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOEL A. HARMATZ, Administrative Law Judge. This case was tried in Chicago, Illinois, on February 16, 1993, upon an original unfair labor practice charge filed on May 22, 1992, and a consolidated complaint issued on February 16, 1993, alleging that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally cutting wage rates, by declining to pay accrued vacation and holiday pay, and by ceasing to make health, welfare, and pension contributions. It is further alleged that the Respondent violated Section 8(a)(5) and (1) of the Act by, on request, refusing to provide the Union with information necessary to perform its duties as exclusive collective-bargaining representative. Finally, the complaint alleges that the Respondent independently violated Section 8(a)(1) by informing employees that protests concerning wage and benefit changes could lead to a loss of employment. In duly filed answers, the Respondent, for the most part, denied that any unfair labor practices were committed. Following close of the hearing, a brief was filed on behalf of the General Counsel.

On the entire record,[1] including my opportunity directly to observe the witnesses and their demeanor, and after considering the posthearing brief, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, an Illinois corporation, with an office and place of business in Chicago, Illinois, is engaged in the processing of meat food products. During the 12 months prior to issuance of the consolidated complaint, the Respondent, in the course and conduct of said business operations, sold and shipped from said facility products, goods, and materials valued in excess of $50,000 directly to points outside the State of Illinois. The complaint alleges, the parties agree, and I find that the Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the parties agree, and I find that the United Food & Commercial Workers International Union, AFL–CIO, Local 100-A (the Union), is a labor organization within the meaning of Section 2(5) of the Act.

[1] Errors in the transcript have been noted and corrected.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Refusals to Bargain*

1. Preliminary statement

The Union has represented the Respondent's production and maintenance employees for 25 years. The most recent collective-bargaining agreement expired on April 30, 1992. Renewal negotiations, and meetings were held on April 20, May 6, June 9, and July 8. No agreement was reached. This case derives its essence from the Respondent's cost-cutting measures in the course of those negotiations, and its failure to accommodate the Union's request for proof as to the Respondent's professed inability to afford anything short of severely reduced employment terms.

2. Unilateral changes in existing terms

There is no dispute that, while negotiations were in progress, the Respondent modified employment benefits that unit employees had enjoyed under the recently expired collective-bargaining agreement. The parties specified that these changes occurred as follows:

> On or about May 11, 1992, Respondent reduced the wages of unit employees by 25 percent.
>
> On or about May 25, 1992, Respondent ceased paying holiday wages.
>
> On or about May 25, 1992, Respondent ceased granting accrued vacation benefits.
>
> On or about June 10, 1992, Respondent ceased making health and welfare and pension contributions on behalf of unit employees.

In addition, Steven Tarnowski, the Union's vice president, testified that these measures were invoked without providing the Union advance notice and an opportunity to bargain. This was not denied, nor did the Respondent present evidence suggesting that in the case of any of these mandatory subjects of collective bargaining, negotiations had proceeded to bonafide impasse before any of the particularized terms were reduced or withheld. Accordingly, it is concluded that the Respondent violated Section 8(a)(5) and (1) of the Act in each instance.

3. The refusal to provide requested information

The consolidated complaint sets forth two occasions where the Respondent violated Section 8(a)(5) and (1) by declining to provide information requested by the Union. Undisputed evidence demonstrates that the Respondent before and during formal negotiations repeatedly indicated its inability to afford benefit levels defined in the most recent contract, and stood firm on its proposal for drastic cuts in wages and fringe benefits.[2]

[2] See, e.g., Jt. Exh. 1(10). The testimony of Steven Tarnowski, the Union's spokesman and vice president, that Jack Lachmann, the Respondent's president, throughout negotiations, persistently plead poverty if benefits were maintained at existing levels was confirmed by Lachman's admission that he described the Company to Tarnowski as ''going broke'' while advising, ''I am not making any money.'' Lachmann did not deny any of the remarks or positions attributed to him by Tarnowski.

Also undisputed is the evidence as to union efforts to test the Respondent's representations in this regard. First, at a bargaining session on June 9, 1992,[3] the Respondent's president, Jack Lachmann, an agent and supervisor within the meaning of the Act, reiterated that he could not afford to pay the benefits under the 1989–1992 contract, and hence could not afford the additional costs evident in the Union's proposal for a new agreement. The Union reacted through Tarnowski's verbal request that it be permitted to audit the Respondent's books. Lachmann refused, declaring ''there would be no audit, the union was not his partner.'' At the next meeting on July 8, the Respondent provided the Union with the first page of each of its corporate tax returns for 1989 and 1990. Tarnowski advised that additional information would be necessary.

Subsequently, Tarnowski, by letter of August 12, renewed the request, this time detailing the data that would be required for completion of the audit, as follows:

> 1. Financial statement prepared by Respondent's auditor
> 2. Net income for the last three (3) years
> 3. Year-end cash balance for the last three (3) years
> 4. Unpaid invoices filed for accounts payable
> 5. Cash disbursement journal
> 6. General ledger
> 7. Payroll journal shown quarterly; Payroll tax returns; W-2's and 1099's
> 8. Cash receipts journal, and accounts receivable list.

On October 6, in a telephone conversation, Lachmann inquired about a return to negotiations, whereupon Tarnowski inquired as to whether the information requested would be provided. Lachmann replied that ''the Union had gotten all it was going to get.'' Consistent with Lachmann's stated position, as of the date of the hearing, no information, other than the partial tax returns submitted on July 8, had been provided.

On the foregoing, it is apparent that the request for an audit was triggered solely by the Respondent's repeated declarations as to both a present inability to afford existing benefit levels and any new contract that did not reflect major cuts. The alternative, declared by the Respondent, was plant closure. These representations had dire implications for employees in the unit, and their bargaining representative had a right to adopt a protective course by taking measures designed to assure that the Respondent's pleas of poverty were founded on fact, rather than a falsely premised, bargaining stratagem. In sum, the Respondent had adopted a bargaining stance which provided the Union an enforceable statutory right to conduct a financial audit, and, to that end, to obtain the information outlined in its letter of August 12.[4] Accordingly, the Respondent, on and after June 9 and August 12, having failed to make a complete return in that regard,[5] violated Section 8(a)(5) and (1) of the Act.

[3] Unless otherwise indicated all dates refer to 1992.

[4] See, e.g., *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *R.E.C. Corp.*, 307 NLRB 330 (1992).

[5] The first page of the Respondent's corporate tax return ''in no way would enable the Union to intelligently determine whether the Respondent was making its best offer'' and hence could not be construed as substantial compliance with this aspect of the duty to bargain in good faith. *Tony's Meats, Inc.*, 211 NLRB 625, 626-627 (1974).

B. *Interference, Restraint, and Coercion*

It is alleged that, on or about September 1, 1992, the Respondent violated Section 8(a)(1) when Lachmann threatened employees with loss of employment because they protested certain unilateral changes. In support, Rose Torres, an employee with 25 years service, testified that on the date in question, she and a coworker, Sandra Witkowski, confronted Lachmann concerning their vacation pay. Lachmann blamed the Union, and an argument ensued concerning the company's efforts to reduce benefits. Ultimately, when Witkowski protested the failure to pay the vacation benefits, noting the length of service they held and that they deserved better treatment, Lachmann replied that ''if . . . [they] . . . didn't like it . . . [they] . . . could quit . . . and . . . [they] . . . didn't deserve a vacation.'' As the General Counsel correctly observes, under the precedent, the suggestion that employees quit rather than protest an unlawful termination of benefits has been equated with a threat tending to impede employees in the exercise of Section 7 rights. *Bill Scott Oldsmobile*, 282 NLRB 1073, 1074 (1987). The Respondent thereby violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent violated Section 8(a)(1) of the Act by informing employees that they should quit, rather than complain about unlawfully denied employment terms.
4. The Respondent violated Section 8(a)(5) and (1) of the Act by, without first notifying or providing an opportunity to bargain to the exclusive collective-bargaining agent, reducing wage rates, refusing to pay accrued holiday and vacation benefits, and terminating health, welfare, and pension contributions on behalf of employees in the following appropriate unit:

> All production and maintenance employees, excluding nonworking supervisory foremen, office workers, sales men, and engineers.

5. The Respondent violated Section 8(a)(5) and (1) of the Act by, on June 9 and August 12, 1992, refusing to provide the Union with information relevant and necessary to its duties as exclusive bargaining agent for the aforedescribed employees.
6. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, it shall be recommended that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally reducing wage rates and declining to compensate employees for accrued holiday and

vacation benefits, it shall be recommended that the Respondent be ordered to make whole employees for losses incurred thereby.

Having found that the Respondent further violated Section 8(a)(5) and (1) of the Act by unilaterally suspending contributions to health, welfare and pension plans covering employees in the appropriate bargaining unit, it shall be recommended that the Funds affected be reimbursed in full for all delinquencies incurred until the Respondent either agrees to renew its obligations in that regard or, following good faith bargaining, until a genuine impasse is reached with respect to termination of such benefits. In the interim, it shall be recommended further that the employees be made whole for any losses they sustained by reason of noneligibility for benefits in consequence of the Respondent's discontinuance of such contributions.

All sums due under the terms of the recommended Order shall include interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Gaucho Meats, Inc., Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Advising employees that they should quit, rather than protest unilateral changes in their employment terms.

(b) Refusing to bargain in good faith with the Union concerning the rates of pay, wages, hours and working conditions of employees in the following appropriate unit:

> All production and maintenance employees, excluding non-working supervising foreman, superintendents, office workers, salesmen, chauffeurs and engineers.

(c) Refusing to bargain in good faith by unilaterally, and—without prior notice to the Union and without negotiating to impasse with—reducing wage rates, refusing to pay accrued holiday and vacation benefits, and terminating health, welfare, and pension contributions on behalf of said employees.

(d) Refusing to bargain in good faith by failing, on request, to furnish information relevant and necessary to the Union's performance as exclusive representative of employees in the aforedescribed collective bargaining unit.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Bargain in good faith with the Union concerning wages, hours, and terms and conditions of employment of employees in the aforedescribed appropriate unit.

(b) On request, furnish the Union the information sought in its letter of August 12, 1992.

(c) Make whole employees in the above unit for reduced wages, and unpaid holiday and vacation pay, with interest, as set forth in the remedy section of this decision.

(d) Reimburse the Local 100-A Health and Welfare Fund and the Local 100-A Pension Fund for unpaid contributions, with interest.

(e) Reimburse employees in the above unit for any and all losses sustained by reason of any loss of eligibility for health and welfare benefits caused by the unilateral suspension of contributions, with interest.

(f) Preserve and, on request, make available to the Board and its agents for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this order.

(g) Post at Its facility in Chicago, Illinois, copies of the attached notice marked ''Appendix.''[7] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''